

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 131

Docket No. SF-0752-08-0701-I-1

**George S. Guevara,
Appellant,**

v.

**Department of the Navy,
Agency.**

July 14, 2009

George S. Guevara, San Ysidro, California, pro se.

Thomas R. Avey, Sr., San Diego, California, for the agency.

Tony Tomlinson, San Diego, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision (ID) dismissing his appeal as settled. For the reasons set forth below, the Board DISMISSES the appellant's petition for review (PFR) as untimely filed by 171 days without a showing of good cause for the filing delay.

BACKGROUND

¶2 The agency removed the appellant from his Air Conditioning Equipment Mechanic position with the Naval Facilities Engineering Command Southwest in

San Diego, California, for violating a Last Chance Settlement Agreement. Initial Appeal File (IAF), Tab 1 at 14-15, Tab 6, subtab 4(B).

¶3 The appellant timely filed a Board appeal challenging the removal action, and designated a representative. IAF, Tab 1 at 4, 6-11. On September 26, 2008, the administrative judge issued an ID that dismissed the appeal as settled, and apprised the appellant of the October 31, 2008 deadline for filing a PFR. ID at 1-2.

¶4 On April 20, 2009, 171 days after the filing deadline, the appellant filed a PFR of the ID arguing the merits of the removal action. Petition for Review File (PFRF), Tab 1. On April 28, 2009, the Office of the Clerk issued a notice informing the appellant that the Board may dismiss his PFR as untimely unless he filed a motion, including a statement, signed under penalty of perjury, or an affidavit, showing that his PFR was timely filed or that good cause existed for the filing delay. PFRF, Tab 2. The appellant did not respond to the Clerk's notice. The agency has responded in opposition to the PFR. PFRF, Tab 4.

ANALYSIS

¶5 A PFR must be filed within thirty-five days after the issuance of the ID or, if the petitioner shows that the ID was received more than five days after the date of issuance, within thirty days after the date the petitioner received the ID. [5 C.F.R. § 1201.114](#)(d). The Board will waive this time limit only upon a showing of good cause for the filing delay. [5 C.F.R. § 1201.114](#)(f). The appellant bears the burden of proof with regard to timeliness. *Smith v. Department of the Army*, [105 M.S.P.R. 433](#), ¶ 4 (2007).

¶6 The Board may grant or deny the waiver of a time limit for filing a PFR, in the interest of justice, after considering all the facts and circumstances of a particular case. *Smith*, [105 M.S.P.R. 433](#), ¶ 5. To establish good cause for an untimely filing, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Id.*; *Alonzo v.*

Department of the Air Force, [4 M.S.P.R. 180](#), 184 (1980). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Smith*, [105 M.S.P.R. 433](#), ¶ 5; *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶7 Although the ID clearly informed the appellant of the October 31, 2008 deadline, he filed his PFR 171 days late. *See* PFRF, Tab 1; ID at 2. Further, the appellant did not respond to the Clerk's notice to address the timeliness issue. *See* PFRF, Tab 2. Although the appellant is acting pro se on review, the filing delay is significant, and he has not presented any evidence or argument to show that good cause exists for waiving the filing deadline. *See Groesbeck v. Office of Personnel Management*, [109 M.S.P.R. 1](#), ¶ 4 (2008) (where the appellant untimely filed her PFR by six months and did not respond to the Clerk's notice to establish good cause for the delay, the Board dismissed the PFR as untimely filed); *Mitchell v. Broadcasting Board of Governors*, [107 M.S.P.R. 8](#), ¶ 8 (2007) (the Board dismissed the PFR as untimely filed where the appellant filed her PFR two months late, and did not respond to the Clerk's notice to establish good cause for the delay). He merely argues the merits of the agency's removal action, which does not establish good cause for waiving the filing deadline. PFRF, Tab 1; *see Crook v. U.S. Postal Service*, [108 M.S.P.R. 553](#), ¶ 7, *aff'd*, 301 F. App'x 982 (Fed. Cir. 2008). Thus, the appellant has failed to show that he exercised due diligence or ordinary prudence in this case that would justify waiving the filing deadline.

¶8 We therefore DISMISS the petition for review as untimely filed without a showing of good cause for the delay.

ORDER

¶9 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision will remain the final decision of the Board with regard to the dismissal of the appeal as settled. [5 C.F.R. § 1201.113](#).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.